

Consultation Questionnaire

This questionnaire document accompanies the consultation paper and is intended for you to record your responses to the questions raised within the paper. The questions which appear in the consultation paper are presented in full below and are numbered and are ordered as they appear in the consultation paper.

You should read through the consultation paper and then record your answer to each question in the space provided. Please answer as many questions as you wish; you do not need to answer all of the questions if you do not wish to do so.

Additional pages are also provided at the end of the document in case further space is required for your response to any of the questions.

Please send this completed consultation questionnaire and your respondent information form (see the information on “handling your response” in the consultation paper) to:

Andrew.Mackenzie@FAreview.org

or

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If you have any queries please contact Andrew Mackenzie on 0131 225 5972.

The consultation document can also be viewed online at
<http://www.scotland.gov.uk/FAreview>.

Questions

Section 1- Introduction

There are no questions within this section of the consultation paper

Section 2- General

The questions from section 2 of the consultation paper are presented below.

1. Should there be any change in the purpose or the features of FAIs? (Please tick one box)

Yes X

No

If yes, please outline the changes that you think should be introduced.

We agree that an FAI should be a fact-finding exercise carried out in the public interest. It is important that there is an independent procedure to investigate specific deaths and that appropriate action is taken to prevent similar incidents in future.

We also agree that ideally an FAI should be held locally, have recognised participants and that the evidence and determination should be public.

The intention was that FAI's would be inquisitorial rather than adversarial and we agree that this is the appropriate approach. However, in our experience this culture shift has not actually happened. This may be partly because FAI's tend to take place in sheriff courts with sheriffs presiding and changes to the setting may help change the approach.

We think it is important that the person making the determination is legally qualified. However, we don't think that there is a need for that person to always be a judge. The various Tribunal systems use panels of individuals with various expertise and we can see merit in such a system being explored to conduct FAI's

2. Should FAIs be held in some forum other than the sheriff court? (Please tick one box)

Yes X

No

If yes, what forum would you suggest?

We think that the use of a Tribunal system should be explored.

Why have you suggested this forum?

We have suggested looking at using a Tribunal because we think that the court setting encourages an adversarial approach. Moving FAI's to a different physical setting may help bring about a culture shift. We also think this would be less formal and intimidating for witnesses.

We don't think moving jurisdiction to the Court of Session is a good idea. This would be more formal and expensive as well as increasing delays.

3. Should specialist procurators fiscal handle FAIs? (Please tick one box)

Yes X

No

Please explain your answer.

The current system has been criticised because FAI's are not given priority. This is partly because of the volume of criminal work. In addition, Procurator Fiscals don't build up experience of dealing with FAI's because there are relatively few in Scotland each year. A system of specialist procurator fiscals who work on FAI's for a period of time would deal with these issues.

If you answered yes, above, should they be part of a centralised team dedicated to FAIs? (Please tick one box)

Yes X

No

Please explain your answer.

On balance we think that a centralised team is the best option. In some areas, FAI's are rare and so a designated procurator fiscal is unlikely to build experience and expertise. A central team would also be easier to operate in terms of the provision of training and other support.

4. Should the scope of the Act be altered so as to cover FAIs into the death of a Scot abroad? (Please tick one box)

Yes X

No

Please explain your answer.

We think it is important to have a system that allows investigations where people die while abroad on holiday.

We are unable to comment on the issue of the deaths of servicemen abroad as this is not within our area of knowledge and expertise.

5. Should it be possible for FAIs to be held, where appropriate, into multiple deaths in more than one jurisdiction? (Please tick one box)

Yes X

No

Please explain your answer.

Where there has been more than one death from a common cause we think it makes sense to have the facility to hold one inquiry.

Section 3- The decision that an FAI should be held

The questions from section 3 of the consultation paper are presented below.

6. Should the deaths which fall within the mandatory category be changed?
(Please tick one box)

- | | |
|--|-------------------------------------|
| Yes, certain deaths should be added | <input checked="" type="checkbox"/> |
| Yes, certain deaths should be removed | <input type="checkbox"/> |
| Yes, both additions and removals should be made | <input type="checkbox"/> |
| No, no change should be made to the mandatory category | <input type="checkbox"/> |

If you answered yes, that deaths should be added or removed, please explain your answer.

We think that deaths of people detained under the Mental Health (Care and Treatment)(Scotland) Act 2003 should be included in the mandatory category. Those individuals who have been deprived of their liberty should have the same protection as those detained in prison or police cells.

We are unable to comment on the points raised about road deaths as this is not within our area of knowledge and expertise.

7. Should the requirement to hold an FAI into a death which falls into the mandatory category be subject to exception?

(Please tick one box)

Yes

No

Please explain your answer.

We can see that there is merit in making sure that families and relatives do not need to attend multiple hearings. However, we think it is important that systems are in place to make sure the exception is only used where deaths have been adequately explained or investigated through other channels.

We think it is crucial to investigate all deaths where someone's liberty has been restricted and that this should not be subject to exception.

8. Should other interested parties be able to make representations to the Lord Advocate during the decision making process? (Please tick one box)

Yes X

No

If yes, which parties should be able to make representations?

We think that "anyone with an interest" should be able to make representations. This could include family, friends, and care providers.

Please explain why you feel that these parties should be able to make representations.

Many people with learning disabilities do not have families who are able to make representations after their death. For example, they are less likely to marry and have children. We think that extending the category of people who can make representations would protect the rights of individuals. The Lord Advocate would be able to consider the representations as well as any vested interests before making a decision.

9. Where the Lord Advocate decides not to hold an FAI, should a formal, reasoned decision be provided to relatives of the deceased? (Please tick one box)

Yes X

No

Please explain your answer.

In our experience, families have not received sufficient information about why decisions are made. This leads to additional stress and frustration. They have then required help and assistance in challenging a decision.

We believe strongly that families should have a right to be told of the reasons behind a decision. This means they understand the process and feel included. They should also be provided with information about the other options that might be available to them including bringing a civil case.

It would also be a big improvement if a system for internal review of decisions was introduced as judicial review is an expensive and inaccessible remedy for challenging decisions.

Section 4- Holding an FAI

The questions from section 4 of the consultation paper are presented below.

10. Is adequate notice given to interested parties in advance of an application being made? (Please tick one box)

Yes

No X

If no, please explain your answer and outline what you feel would be adequate notice.

The current position is that families are given 21 days notice of the hearing. We think this is unlikely to be adequate in certain circumstances. For example, if the family wish to attend they might need to arrange time off work. If they wish to be legally represented this will not allow sufficient time to make arrangements.

On the other hand, one of the major issues for us has been the long delays in holding FAI's and we would not like to see extended timescales contributing to delays.

We think that there should be a duty to consult the family at an early stage. This would establish whether or not they were instructing representation and any difficulties in attending at short notice. At that stage an agreement could be reached on notice given.

A minimum period of 21 days could be set as the default position where the family, or other interested party, does not want any significant involvement.

11. Is adequate advice, information and support provided to the relatives of the deceased? (Please tick one box)

Yes

No X

If no, what improvements could be made?

The process of an FAI is often very stressful for families and we believe that they should have similar access to support as the relatives of victims of crime. We would like to see Victim Support Scotland or a similar organisation providing emotional support.

There are also a number of existing organisations that could provide support and advice to specific groups although an extension of their services would need to be properly resourced.

12. Is the current approach to the provision of legal aid to relatives appropriate? (Please tick one box)

Yes

No X

Please explain your answer.

We think that the current approach should be reviewed and families should be provided with consistent information. Many people think that the procurator fiscal is acting on their behalf and so don't appreciate the need to explore the issue of representation at an early stage.

In addition, we think the approach depends on the outcome of the review as a whole. If there is a move towards a more informal tribunal setting then it might be better to discourage legal representation and use alternatives such as advocacy. However, if FAI's continue to be held in courts or moved to the Court of Session then we think that it should be easier for families to get legal representation.

Section 5: Evidence and procedure

The questions from section 5 of the consultation paper are presented below.

13. Should provision for preliminary hearings be made in respect of the whole of Scotland? (Please tick one box)

Yes X

No

Please explain your answer.

We think that a preliminary hearing can be a useful tool. This provides an opportunity to explore issues such as legal representation, likely witnesses and how long the hearing will take. If this process was standardised it may go some way to reducing delays and the current issues of cases being heard on individual days over a period of months rather than on consecutive days.

14. Should evidential material be provided to parties in advance of the FAI? (Please tick one box)

Yes X

No

Please explain your answer.

We think it makes sense for parties to have time to look at evidence in advance. This avoids the need for cases to be adjourned. However, there may be cases where relatives indicate they do not want to view certain material and this should be respected.

15. Should there be relaxation of the conditions under which signed and sworn statements can be used? (Please tick one box)

Yes

No X

Please explain your answer.

Signed and sworn statements should continue to be used with agreement of all parties. Otherwise they have very limited evidential value.

16. What can be done to ensure that the most authoritative independent experts are selected to give evidence at FAIs?

This is not within our knowledge and expertise so we are unable to make any suggestions.

17. Is there a place for expert assessors in FAIs? (Please tick one box)

Yes X

No

If yes, should more use be made of them? (Please tick one box)

Yes X

No

Please explain your answer.

The FAI's that we have had involvement in have all involved complex medical evidence. As a result of our experience we think that it would be helpful for sheriffs to have access to advice on complicated medical evidence. If FAI's continue to be heard by one legally qualified person, then we think it would be of assistance if they had access to appropriate additional support on technical matters. However, there may be less need for this if a panel is introduced as part of a new Tribunal procedure as other members with appropriate knowledge could be part of the decision making process. On balance we think the latter is the best option as it is more transparent.

18. Should the evidence of a witness at an FAI be inadmissible in other judicial proceedings? (Please tick one box)

Yes X

No

Please explain your answer.

We think that it is desirable that the evidence is not admissible in other judicial proceedings other than allegations of perjury. The purpose of an FAI is to establish what happened and to prevent subsequent deaths. If the evidence of witnesses can be used in a civil case we think that they will understandably feel under pressure and worried about what they say. It would be better to create an atmosphere where people feel able to tell the truth without fear of the consequences.

Section 6 - Determinations

The questions from section 6 of the consultation paper are presented below.

19. Should there be guidance as to matters which should be covered by determinations? (Please tick one box)

Yes X

No

Please explain your answer.

FAI's can involve significant public expense and it is important that there is a level of consistency in the findings. It is also helpful for families to understand what the determination will cover. We understand that at present the contents of determinations varies greatly and we don't think that this is in the public interest.

20. Would it be helpful to create an up to date public database of determinations? (Please tick one box)

Yes X

No

Please explain your answer.

One of our main concerns with the current system is that there is no central place where determinations are logged. This makes it difficult to get information about the nature and types of FAI's held and findings. As the determinations are public documents it would be helpful if these were made available via a central database with search facilities.

21. Should responses to recommendations be monitored? (Please tick one box)

Yes X

No

Please explain your answer.

We think that it is essential that recommendations are monitored. FAI's often involve significant public expense and look at systems and procedures in great detail. One of the purposes of an FAI must be to avoid subsequent unnecessary deaths. We were surprised and disappointed to find that nothing happened to determinations after they were issued and they appear to carry no real weight. Determinations must be widely circulated to interested parties and there must be follow up action to find out what has been done with any recommendations.

If yes, should this be done centrally and by whom?

Yes X

No

It makes sense for this to happen centrally so that it is clear where to get information. We suggest this function may sit with the Justice Department.

If yes, to whom should any report be made?

We think that the relevant government minister should report to the Scottish Parliament.

22. Should the Lord Advocate be able to apply for a further FAI or the re-opening of an FAI? (Please tick one box)

Yes X

No

If no, why not?

If yes, should this only be in limited circumstances? (Please tick one box)

Yes X

No

Please explain your answer.

The current system does not allow an FAI to be reopened and we think this is unsatisfactory. However, it is also undesirable to have FAI's reopened on a regular basis. We suggest that this should only happen where there is fresh evidence that might alter some of the significant findings.

End of questions